



*Western Native Trout Program*

**October 30, 2001**

Mr. Henry Maddox, Field Supervisor  
U.S. Fish & Wildlife Service  
Utah Field Office - Lincoln Plaza  
145 East 1300 South, Suite 404  
Salt Lake City, UT 84115

**Re: Bonneville Cutthroat Trout**

Dear Mr. Maddox:

Trout Unlimited (TU) is writing in regards to the current status of the Bonneville cutthroat trout (BCT), and recent developments in the federal Endangered Species Act (ESA) process. Consistent with previous communications between Trout Unlimited the United States Fish & Wildlife Service (USFWS) Utah Field Office, this letter reiterates some concerns regarding the long-term recovery and management of BCT (5/29/98 letter from Steve Moyer, V.P. Conservation Programs; 1/07/99 letter from Paul Dremann, Utah Council V.P. and Conservation Chair) and the U.S. Fish & Wildlife Service (USFWS). In this letter, TU submits formal comments regarding the recent BCT ESA status review and "not warranted" finding (66 Fed. Reg. 51362-51366 (Oct. 9, 2001)).

As you are undoubtedly aware, TU has been involved on several fronts in partnership with resource agencies in the four-state area to protect and enhance existing BCT populations, and further, to help expand BCT populations to areas within their historic range from which they have been extirpated. Thousands of TU National's Embrace-a-Stream Program dollars have been utilized by local TU chapters for riparian habitat restoration and native fish reintroduction efforts. This includes important riparian protection and restoration projects such as on Little Dell Creek, City Creek, and Parleys Creek on the Wasatch Front; working in cooperation with the Goshute Tribe, private landowners, and resource agencies to restore BCT to historic waters on tribal and public

lands in the Deep Creek Mountains and Mt. Wheeler Range; and constructing fish barriers to help minimize contact between pure BCT populations and non-native fish such as rainbow, brook, and brown trout. Further, the Utah Council has provided consistent and active representation on the BCT Technical Team. In addition to Utah TU activities, the Idaho, Wyoming, and Nevada TU councils are interested in protecting and restoring BCT within their respective states. Finally, TU recently announced the formation of our Western Native Trout Program, and part of this program focus will involve tracking major native fish issues west-wide, including those related to BCT recovery.

In addition to our own restoration and partnership efforts, TU remains supportive of the multi-jurisdictional efforts of federal and state resource agencies to protect and restore BCT populations. The BCT range-wide conservation agreement and correlative conservation strategy is a marked improvement from previous agency commitments, and in time, should contribute greatly to ensuring the survival and long-term persistence of BCT populations. Further, we have actively participated in many of the technical meetings related to the development of these long-term plans, and have been receptive to allowing such strategies time to work prior to initiating full-scale federal Endangered Species Act protections. With this in mind, we would like to highlight some of the issues and possible ramifications arising from the recent decision by the USFWS to not list BCT pursuant to the ESA.

#### **"Not Warranted" Finding:: General Comments**

There is an obvious legal distinction between a "not warranted" and "warranted but precluded" ESA finding. While the legal protections afforded a candidate species under the ESA are limited, there is still an undeniable role for the USFWS in reviewing specific federal actions that may impact such species and a requirement that such species' status be re-examined pursuant to specific statutory timelines.<sup>1</sup> While some resource stakeholders in the West prefer to limit federal involvement and oversight at all costs, TU prefers to focus on what is best for the fish and achieving overall recovery goals. In the case of the BCT - whether the fish are afforded any type of ESA protection or not - there should be a role for the USFWS to help coordinate and participate in the on-going process to review and improve where necessary current conservation strategies and programs.

Trout Unlimited's biggest concern in this regard is that the current momentum to improve the status of BCT throughout the five geographic units within the historic range of the species be maintained. There has been a tremendous amount of state and federal agency activity in the past decade dedicated to protecting and restoring native fish. While

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<sup>1</sup> See 16 U.S.C. § 4(b)(1)(C)(i) (the petition for a "warranted but precluded" species is considered "re-submitted" on the date of the finding and the USFWS must assume that the information in such petition is "substantial"); and 16 U.S.C. § 4(b)(1)(C)(iii) (directing the USFWS to develop and implement a system to effectively monitor the status of "warranted but precluded" species and make prompt use of ESA § 7 consultation authority to prevent significant risks to such species).

much of this focus is due to new agency priorities and recognition of the importance of native flora and fauna to preserving biodiversity and overall ecosystem health, the reality is that the ESA has been a driver for much of this change and conservation strategy development. It is certainly TU's hope that agencies, private landowners, and other stakeholders will not merely breathe a sigh of relief now that the BCT are not listed, but rather re-dedicate themselves to fixing longstanding resource problems, and providing permanent direction to field offices and staff to continue the systematic removal of threats to species persistence. Specifically, it is imperative that federal land management agencies who have authority over the majority of the lands where BCT reside continue to designate the BCT as a "sensitive" species and provide management and funding consistent with overall recovery objectives.

There is another more practical reason for continued USFWS involvement in the development, implementation, and monitoring of BCT conservation programs: the ESA issues are not going to merely disappear based on the agency's initial twelve-month finding. It is our understanding that the recent multi-species settlement between the agency and environmental group petitioners pertained only to the duty of the federal government to issue a 12-month finding regarding the BCT petition. Therefore, the petitioners are within their rights to pursue a legal challenge to the listing decision. History dictates that they most likely will file such a challenge.

In light of likely legal challenges, the fact that the BCT has been petitioned for listing three times in approximately the last 25 years, and historical gaps in consistent agency funding and management emphasis, the USFWS must fill a much needed role regarding the technical, legal, and policy sufficiency of the underlying regulatory mechanisms on which the agency has relied to not list the BCT. It will be necessary for the USFWS to help the resource agencies and other stakeholders design and evaluate data collection and analysis programs and conservation efforts - both on paper and in terms of actual implementation - in a manner that will withstand legal challenge. In this regard, TU would like to make two specific comments related to the recent 12-month finding published in the Federal Register and the underlying USFWS-conducted species status review.

### **USFWS Status Review: Abundance Estimates**

The BCT status document is a very good in-depth review of each major geographic unit. The USFWS and those agencies that submitted comments during the federal review process should be commended for their efforts to create such a record and a comprehensive delineation of historical and current distribution and status. That said, the conclusions regarding abundance (852 stream miles, 70,059 acres of lake habitat, and 291 populations) are somewhat misleading and ripe for challenge.<sup>2</sup> The status review explicitly states that populations identified by State and Federal agencies as meeting the

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<sup>2</sup> UNITED STATES DEPARTMENT OF THE INTERIOR, U.S. FISH & WILDLIFE SERVICE, DRAFT STATUS REVIEW FOR BONNEVILLE CUTTHROAT TROUT (October 2001).

proposed federal intercross policy count as BCT unless specific physical, genetic or behavioral information indicates otherwise.<sup>3</sup> In other words, absent verifiable data, populations are assumed to be BCT if they meet the somewhat arbitrary and amorphous federal intercross policy standards.

TU believes that the populations that have not been specifically tested for levels of genetic purity or introgression should not be assumed to be BCT. Doing so places unnecessary risk and a conservation burden on the species. This burden should instead be assumed by the various agencies to conduct the necessary testing to verify the actual genetic conditions and characteristics of specific populations. It does not help that the USFWS has chosen to base such determinations on a draft 1996 policy that has been questioned in terms of applicability to resident trout. TU was under the impression that the USFWS was working on a revised intercross policy that would better incorporate species-specific genetic characteristics and data.<sup>4</sup> Further, a number of the western states have worked on a position paper regarding genetic considerations associated with cutthroat trout management.<sup>5</sup> The paper emphasizes the importance of population specific information so that conservation plans can be developed to ensure the long-term persistence of both "core populations" that represent the historic genome of a cutthroat species (no detectable introgression) and conservation populations that retain a specific cutthroat phenotype with unique genetic, ecological, or behavioral attributes despite slight introgression.<sup>6</sup>

The bottom line is that TU generally supports the concepts encompassed by the multi-state position paper including the management vision (establishing core, conservation, and recreational populations) and genetic quantification (determining introgression with guidelines enunciating an introgression formula, genetic analysis techniques, and a proper genetic sample size). However, the Service has skipped a necessary step prior to highlighting robust BCT abundance numbers - ensuring that the state and federal agencies have verified the genetic composition of each population. Only

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<sup>3</sup> *Id.*

<sup>4</sup> TU field staff attended a recent Greenback Cutthroat Recovery Team meeting at which a USFWS representative stated that the proposed intercross policy had been scrapped with no plans for a revised or amended policy. Further, it was emphasized that individual recovery teams will be responsible for defining what "pure" means for the respective species (i.e., each team will define their own intercross policy). Obviously, this raises more questions than it answers. Relying on a draft policy that the agency no longer supports to justify abundance findings in the BCT status review sets bad precedent in this review and for similar reviews in the future.

<sup>5</sup> UTAH DIVISION OF WILDLIFE RESOURCES, PUBLICATION NUMBER 00-26, CUTTHROAT TROUT MANAGEMENT: A POSITION PAPER, GENETIC CONSIDERATIONS ASSOCIATED WITH CUTTHROAT TROUT MANAGEMENT (Developed by the Colorado Division of Wildlife, Idaho Department of Fish and Game, Montana Fish, Wildlife and Parks, Nevada Division of Wildlife, New Mexico Game and Fish, Utah Division of Wildlife Resources, and Wyoming Game and Fish Department).

<sup>6</sup> *Id.* at 3-7.

after completing this step for all hypothetical populations will we know not only the actual range-wide status of BCT, but also which management paradigm is most applicable.<sup>7</sup>

### **USFWS Reliance on Existing Conservation Plans and Activities**

Perhaps more important than the technical deficiencies in the status review, TU is concerned about the legality of the USFWS reliance on existing state and federal interagency conservation agreements in lieu of listing. We are stating this concern not because we don't support such efforts, or recognize the incredible agency effort necessary to craft such plans. Further, the USFWS undoubtedly has the discretion under the ESA to take into account existing state and federal agency conservation efforts when deciding whether to list a species.<sup>8</sup> Our concern is based on the fact that such programs must be designed with federal case law in mind. In recent years, faced with similar fact scenarios, federal judges have invalidated agency decisions not listing particular species by focusing on the limited duration of such plans, lack of consistent funding, the dearth of substantive regulatory changes or amendments to ensure that agency activities actually remove threats to the species, and no proven track record for success.<sup>9</sup>

Again, TU is not raising these concerns as an entity arguing for listing at this time, but rather as a stakeholder interested in protecting one of the West's great native fish either with or without ESA intervention. Regardless of the outcome of a legal challenge to the BCT listing decision, the range-wide conservation strategy should be considered an innovative and well-intentioned approach to species recovery. However, the USFWS should continue to communicate with other agency partners regarding the sufficiency of existing conservation strategies, and where such programs can be strengthened including increased and secure funding, tight timelines for conservation activities design and

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<sup>7</sup> The importance of genetic testing and verification reaches beyond mere number counting and specific population status estimates', See e.g., R. Paul Evans and Dennis K. Shiozawa, *The Genetic Status of Greenback Cutthroat Trout (Oncorhynchus clarki stomias) Populations in Colorado* (Draft Report to the Colorado Division of Wildlife, August 27, 2001)(highlighting Yellowstone cutthroat introgression in reintroduced greenback cutthroat populations; the greenback populations - thought to be pure based on meristic analyses - had been used for reintroduction efforts for the past 25 years). Genetic testing has come a long way in the past 20 years, and results from current and future studies will undoubtedly lead to greater assurances regarding species status and reintroduction issues.

<sup>8</sup> 16 U.S.C. § 4(b)(1)(A)(requiring the Secretary to make listing decisions "after taking into account" efforts by the State and other to protect such species).

<sup>9</sup> See *Biodiversity Legal Foundation v. Babbitt*, 943 F. Supp. 23 (D.D.C. 1996) and *Southwest Center for Biological Diversity v. Babbitt* 939 F. Supp. 49 (D.D.C. 1996)(emphasizing that the Secretary "cannot use promises of future actions as an excuse for not making a determination based on the existing record"); *Friends of the Wild Swan, Inc. v. U.S. Fish and Wildlife*, 945 F. Supp. 1388 (D. Or. 1996)(the court held that the USFWS "cannot rely upon its own speculation as to the future effects of another agency's management plans to put off listing" and justify a "not warranted" finding for bull trout); and *Oregon Natural Resources Council, et al., v. Daley*, 6 F.Supp. 2d 1139 (invalidating NMFS reliance on an approximately 2000 page plan by the state of Oregon to not list coho salmon because the plan was primarily based on better enforcement of existing laws and voluntary/unenforceable recovery efforts).

implementation, stronger substantive provisions, and reporting mechanisms that ensure conservation successes are tallied for cumulative purposes in an organized and coordinated manner.

It is imperative that the USFWS communicate firmly to the states and federal land management agencies strong guidance for BCT management, monitoring, and funding to ensure long-term restoration and recovery goals are met. This is especially true for many of the Forest Service and Bureau of Land Management land use plans that are either currently being revised or will be sometime in the near future. Such administrative processes allow ample opportunity for the agencies to provide permanent protection for important native fish strongholds and the ability to require stricter standard and guidelines that protect BCT throughout their historic range and provide better habitat conditions for both existing and reintroduced populations.

Trout Unlimited appreciates the opportunity to comment regarding the recent BCT listing decision. We look forward to working with the USFWS and other federal and state agencies to protect and recover BCT. Please don't hesitate to call with any questions or comments regarding the contents of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Yates". The signature is fluid and cursive, with a large initial "S" and a stylized "Yates".

Scott Yates - Director  
TU Western Native Trout Program

**Cc:** Yvette Converse, USFWS  
Steve Moyer, TU V.P. Conservation Programs  
Wes Johnson, TU Utah Council Chair  
Ken Rettalic, TU Idaho Council Chair  
Kathy Buchner, Director, TU Wyoming Council